



FEDERAL ELECTION COMMISSION  
WASHINGTON, D.C. 20463

**BEFORE THE FEDERAL ELECTION COMMISSION**

**In the Matter of**

**John James for Senate, Inc., et al.**

**MUR 7432**

**STATEMENT OF REASONS OF VICE CHAIRMAN MATTHEW S. PETERSEN AND  
COMMISSIONER CAROLINE C. HUNTER**

The Complaint in this matter alleges that Outsider PAC, which is a super PAC, republished campaign materials prepared by John James for Senate, Inc. (the "Campaign"), and that the Campaign and Outsider PAC coordinated communications through the use of a common vendor. Respondents deny the allegations. The Commission's Office of General Counsel ("OGC") recommended the Commission find reason to believe that Outsider PAC violated the Federal Election Campaign Act of 1971, as amended (the "Act"), by making a prohibited in-kind contribution to the Campaign by republishing campaign materials.<sup>1</sup> OGC also recommended the Commission take no action on the coordination allegations pending an investigation.<sup>2</sup> We disagreed with these recommendations and write to explain our reasoning:

The Complaint bases its allegations on two YouTube videos<sup>3</sup> — one released by the Campaign and the other released by Outsider PAC — and the Respondents' use of the same media consultants. The Campaign's advertisement contained three short video clips of James' opponent, Sandy Pensler attacking President Donald Trump. Outsider PAC's advertisement contained two of these three clips. Together, the two common video clips were about six seconds. This six seconds of video is where the similarities between the ads end. Generally, the Campaign's ad focused entirely on attacking campaign opponent Sandy Pensler and his

<sup>1</sup> 52 U.S.C. §§ 30104(b), 30116(a), and 30118(a); MUR 7432 (John-James for Senate, *et al.*), First Gen. Counsel's Rpt. at 2.

**2** *Id.*

3. See MUR 7432 (John James for Senate, Inc., *et al.*), Compl. at 2-3 (citing Liberal Sandy Pensler Mocks President Trump Just Like a Democrat! (the Campaign Ad), YouTube (uploaded July 10, 2018) and Difference (Outsider PAC Ad), YouTube (uploaded July 14, 2018)). The original link provided by the Complaint was unavailable. However, a copy of the video was uploaded by WDIV-Local 4 News at <https://www.youtube.com/watch?v=jkbnLlswldI>.

opposition to President Trump.<sup>4</sup> Outsider PAC's ad, which was released several days after the Campaign's, spent ten of its thirty seconds attacking Pensler and the remaining twenty seconds emphasizing James' support of President Trump.<sup>5</sup> The Complaint further alleges that the Campaign and PAC coordinated through their common use of Grand Rapid Strategies, a media vendor. Based on the content of the advertisements and the committees' use of a common vendor, the Complaint infers that Outsider PAC republished the Campaign's advertisement and made a coordinated communication under 11 C.F.R. § 109.21, thereby making a prohibited in-kind contribution to the Campaign.<sup>6</sup>

Our position on the Act's republication provision has been consistent: "[It] is designed to capture situations where third parties [] subsidize a candidate's campaign by expanding the distribution of communications whose content, format, and overall message are devised by the candidate."<sup>7</sup> That is not what happened here. As we concluded in prior matters involving television ads, Outsider PAC did not repeat the candidate's message; it created its own.<sup>8</sup>

As an initial matter, it is not clear who recorded the common video footage. That video footage did not contain, however, a message created by the James campaign. Rather, the content was spoken by James's opponent, Sandy Pensler.<sup>9</sup> Moreover, although both ads incorporate the same six seconds of Sandy Pensler on video, the balance of Outsider PAC's ad differed from the Campaign's ad. While the Campaign's ad focused entirely on Pensler's attacks on President Trump, Outsider PAC's ad discussed James's military credentials, as well as his alliance with President Trump on various immigration policies, to argue that James is the right candidate for Michigan's Senate seat.

<sup>4</sup> See the Campaign Ad, YouTube (uploaded July 10, 2018), available at <https://www.youtube.com/watch?v=CMlyZVQv1tw>.

<sup>5</sup> Outsider PAC Ad, YouTube (uploaded July 14, 2018), available at <https://www.youtube.com/watch?v=ikbnLlswldI>.

<sup>6</sup> MUR 7432 (John James for Senate, et al.), Complaint at 1. The Complaint relies on the fact that its media consultant stated that "there [was] no way for [Outsider PAC] to make the spot by pulling footage of James' spot from YouTube" in asserting that the Campaign must have shared the footage with Outsider PAC.

<sup>7</sup> MUR 6357 (American Crossroads), Statement of Reasons of Chair Caroline C. Hunter and Commissioners Donald F. McGahn and Matthew S. Petersen at 4. See also MURs 6603, 6777, 6801, 6870, and 6902, Statement of Reasons of Vice Chairman Matthew S. Petersen and Commissioners Caroline C. Hunter and Lee E. Goodman at 1; MURs 6617 and 6667, Statement of Reasons of Commissioners Caroline C. Hunter and Matthew S. Petersen at 1.

<sup>8</sup> Compare MUR 6357 (American Crossroads), Statement of Reasons of Chair Caroline C. Hunter and Commissioners Donald F. McGahn and Matthew S. Petersen with MUR 6535 (Restore Our Future, et al.), Factual and Legal Analysis of Restore Our Future, Inc. and Charles R. Spies (finding reason to believe that Restore Our Future violated the Act when it released a television advertisement identical to a Mitt Romney campaign video, except for different disclaimers at the end).

<sup>9</sup> We note that Commission regulations exempt from being a contribution any republication of campaign materials "that advocates the defeat of the candidate or party that prepared the material." 11 C.F.R. § 109.23(c)(2). Video of a candidate's stump speech is not necessarily that candidate's campaign material, but at minimum, it remains that candidate's speech or message, not his opponent's.

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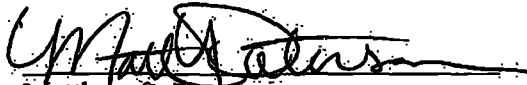
As to the coordination allegation, although OGC recommended that the Commission take no action pending an investigation, we also believe the Complaint provided insufficient evidence to support a coordination finding. The Respondents do not deny that they used a common vendor, but they do deny that campaign material was shared between the Campaign and Outsider PAC.<sup>10</sup> More than a month before the ads were publicly released, Grand Rapid Strategies had implemented a firewall policy that prohibited information sharing between employees working for the Campaign and Outsider PAC.<sup>11</sup> Additionally, the Complaint provides no "specific information"<sup>12</sup> that shows that the firewall policy was not followed, or even more broadly, that the Campaign and Outsider PAC were even coordinating communications. The only evidence provided by the record is the speculation about the Complainant's media consultant.<sup>13</sup> The Commission has repeatedly stated it does not authorize investigations based on speculation. Accordingly, we voted against OGC's recommendation to find reason-to-believe and instead and voted to close the file.<sup>14</sup>

<sup>10</sup> MUR 7432, John James for Senate Resp. at 3; MUR 7432, Outsider PAC Resp. at 4.

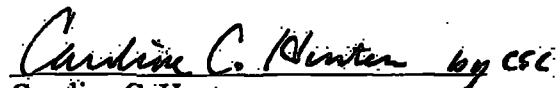
<sup>11</sup> Outsider PAC Resp., Ex. A, MUR 7432; *see also id.* (dating firewall at May 5, 2018, where ads were released on June 10 and June 14, 2018).

<sup>12</sup> 11 C.F.R. § 109.21(h).

<sup>13</sup> Compl. at 1, MUR 7432 ("[A]ccording to our media consultant, it would not be possible to use the campaign's commercial as it appeared on television . . . the differences between the two uses means the PAC had to have access to the original source footage to publish the way it did.").

  
Matthew S. Petersen  
Vice Chairman

8/30/2019  
Date

  
Caroline C. Hunter  
Commissioner

8/30/2019  
Date

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